

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

MID-ATLANTIC RESTAURANT  
GROUP LLC d/b/a/ KELLY'S TAPROOM

Respondent

and

Case 4-CA-162385

ROBIN C. HELMS

Charging Party

*Mark Kaltenbach, Esq.*  
for the General Counsel.  
*Nathan Schadler, Esq.,*  
for Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This is a compliance case that deals with the amounts due to the Charging Party as a remedy for her unlawful discharge by Respondent on April 30, 2015. The underlying Board case is reported at 364 NLRB No. 153 (2016), and it was enforced by the United States Court of Appeals for the Third Circuit at 722 Fed.Appx. 288. The General Counsel issued a compliance specification on June 28, 2018, setting forth the amounts due the Charging Party from the date of her discharge until March 2, 2018, when she failed to respond to an offer of reinstatement. Respondent filed an answer contesting, in part, the amounts in the specification. A trial was held on the outstanding issues on November 15, 2018. After the trial, the General Counsel and the Respondent filed briefs, which I have read and considered.<sup>1</sup>

Based on the briefs of the parties and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following findings of fact and conclusions of law.

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<sup>1</sup> After the hearing, the General Counsel moved to correct the transcript as follows: The word Kaltenbach be replaced with the word Schadler at page 11, lines 2, 5, 7 and 15; page 12, lines 2, 4, 9, 13 and 15; and page 13, line 1. Also the word Schadler be replaced by the word Kaltenbach at page 12, lines 8, 12 and 14. There was no opposition to the motion and the motion is granted.

## Background

Charging Party Robin Helms (hereafter, Helms) was hired by Respondent as a part-time bartender at Kelly's Taproom in March 2014. She worked there until her discharge on April 30, 2015. She was discharged for complaining on behalf of herself and other employees about the scheduling of employees. The more lucrative shifts at Kelly's were those starting at 5 pm on Thursdays, Fridays and Saturdays because these were the shifts that, due to their volume, elicited the most tips, the major part of a bartender's earnings. Helms, who worked mostly on those shifts, and her supporters were concerned that new hires might be assigned the more lucrative shifts at the expense of the more senior bartenders. After considering all of the evidence in the underlying case mentioned above, the Board found that Helms was unlawfully discharged. The details of the discharge and the events leading up to it are set forth in the decision of Administrative Law Judge Mark Carissimi, which was essentially adopted by the Board in the underlying case. Judge Carissimi credited Helms's testimony in that case and rejected Respondent's alleged reasons for her discharge as pretexts.

The compliance specification contains the following breakdown of net backpay due Helms, to which must be added excess tax liability and interest:

Exhibit 2 (Robin Helms' Backpay Calculations)

Quarter/Year	Weeks	Weekly Pay	Earnings	Swig Event & Staffing Coordination, LLC	Guadagnini Newtown, Inc.	Net Backpay
2nd/2015	8.67	\$338.04	\$2,930.81			\$2,930.81
3rd/2015	13	\$338.04	\$4,394.52			\$4,394.52
4th/2015	13	\$338.04	\$4,394.52	\$1,658.00		\$2,736.52
1st/2016	13	\$338.04	\$4,394.52	\$190.00		\$4,204.52
2nd/2016	13	\$338.04	\$4,394.52		\$3,545.63	\$848.89
3rd/2016	13	\$338.04	\$4,394.52		\$1,435.00	\$2,959.52
1st/2017	13	\$338.04	\$4,394.52		\$4,299.07	\$95.45
2nd/2017	13	\$338.04	\$4,394.52		\$4,039.85	\$354.67
3rd/2017	13	\$338.04	\$4,394.52		\$2,406.72	\$1,987.80
4th/2017	13	\$338.04	\$4,394.52		\$2,708.77	\$1,685.75
1st/2018	9	\$338.04	\$3,042.36		\$1,907.38	\$1,134.98
<b>Total</b>						<b>\$23,333.43</b>

## Evidence in the Compliance Hearing

At the compliance hearing, the General Counsel offered the testimony of Helms, together with documents setting forth some of her applications for employment. Helms testified that, when she worked for Respondent at Kelly's Taproom, she mainly worked as a part-time bartender on Thursday, Friday and Saturday nights, until she left Kelly's at about 2 am the next morning. She worked these shifts on a regular basis because she had two very young children and she had childcare availability at those times. She did occasionally work other shifts when asked to do so and if she could arrange child care for those other shifts. Kelly's Taproom, a pub-style bar-restaurant, is located in Bryn Mawr, a suburb of Philadelphia, a 20 to 40 minute drive from Helms's home. Helms did not have to drive through the city to get to Kelly's and her parking did not present safety problems when she ended her regular shifts in the early morning hours. Tr. 23-29.

Immediately after her discharge, Helms updated her resume and starting seeking new employment as a part time bartender. She mainly checked for such jobs on Craig's List, a website that advertises many things, including jobs. But she also asked people she knew in the industry about their knowledge of such jobs. Tr. 31-39. Helms testified that she checked Craig's List for bartending jobs at least 5 times every week. Tr. 39. She sent applications when she saw jobs that had comparable hours and conditions to the one she had at Kelly's and she sent her first application within a week of her discharge. Tr. 42-44. After she contacted the Board about her original case, she started keeping documentary evidence of her job searches and those are in the record as G.C. Exh. 4. But that exhibit does not reflect all of Helms's Craig List efforts to obtain interim employment. Tr. 49-51.

In the roughly 4 quarters at issue here, the ones immediately after her discharge, Helms' applications resulted in 8 to 10 interviews, 6 to 7 in person and 3 to 4 by telephone. Tr. 51-52. Her first interview, shortly after her discharge, was at a place whose owners knew the owners of Kelly's. She was asked why she left Kelly's, answered truthfully, and she did not get that job. On another occasion, she actually worked an unpaid so-called "training shift" at a restaurant before being told that the job required day time employment, something she could not do because of her child rearing responsibilities. On the occasions that required her appearance for a personal interview at the location of a potential job, she made specific arrangements for childcare. Tr. 53-57. During 2 of the 4 quarters at issue, Helms actually worked at a bartending job as an independent contractor and her earnings were deducted from the backpay owed by Respondent. The job, however, had sporadic hours, unlike her work at Kelly's, and, while she performed that work, she continued her job search for a regular part-time bartender position. Tr. 61-63. She finally obtained such a job in March of 2016, with Teca Newtown Square. She obtained that job from a Craigs List ad. It approximated the hours and conditions of her former job at Kelly's and effectively ended Respondent's backpay liability. Tr. 63-67.

I credit Helms's testimony set forth above, which was very detailed and candid, and fully supported by documentary evidence. She was a truthful witness with an impressive demeanor, whose testimony survived vigorous cross-examination. Indeed, the essentials of her testimony on direct were confirmed on cross-examination. For example, in an apparent effort to impeach her testimony, Respondent's counsel pointed out her testimony in the underlying liability case where she set forth her hours of work at Kelly's. But that testimony was consistent with her testimony in this case that she worked primarily the Thursday, Friday and Saturday night shifts and worked other shifts when asked and when she could get childcare. Tr. 75-78. Respondent's counsel also asked questions on cross-examination that seemed to suggest that Helms should have sought jobs as a server. But Helms credibly answered that she never worked a scheduled shift at Kelly's as a server and only did so as part of her bartending duties. Tr. 71-72.

The only other witness in this case was Angie Mitchell, who was called by Respondent. She co-owns Kelly's with her husband. They also owned two other bar-restaurants in the Philadelphia area. Mitchell did not undercut Helms's testimony. Indeed, in significant parts, she corroborated Helms. For example, she corroborated Helms's testimony about her primary shifts and occasional work on other shifts at Kelly's. Tr. 108. Mitchell also explicitly confirmed that Helms was a bartender (Tr. 121). But she also seemed to suggest that Helms was also sometimes a server. Much of Mitchell's testimony in this respect, however, was questionable, particularly in describing the documentary evidence (R. Exh. 2) submitted to support her testimony. Neither Mitchell's testimony nor the documentary evidence showed any significant work as a server apart from whatever serving was attendant to Helms's bartending duties. Tr. 109-114. Indeed, R. Exh. 2 confirms that Helms worked almost exclusively as a bartender. The exhibit lists only two occasions during the period covered in that document where Helms worked as a server and those were for a total of less than 7 hours.

Mitchell also testified that she seeks part-time bartenders by using Craig's List. Tr. 119-120. This confirms that Helms's job search by that method was reasonable. Significantly, none of Mitchell's testimony goes to the issue of willful loss of earnings. Her testimony about her own hiring practices or available jobs at the 3 restaurants she and her husband own does not relate to Helms's job search or available comparable jobs elsewhere. Certainly Respondent never offered to rehire Helms in the 3 restaurants owned by Respondent. Mitchell also testified generally about the use of Craig's List for bartenders' jobs. But that testimony was unspecific and lacked sufficient detail to be useful. To the extent that Mitchell's testimony can be read to contradict Helms or otherwise impugn her job search, I find that Mitchell was an unreliable witness and do not credit her testimony.<sup>2</sup>

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<sup>2</sup> Mitchell also testified that the turnover rate among the part-time bartenders she employs at her bar-restaurants is high. Tr. 116-118. The point of that testimony is unclear to me. But, while it is undoubtedly true, it lacks any relatedness to Helms's job search and does not show that Helms's job search was not reasonable.

Respondent asserts that R. Exh. 2 shows that Helms worked a quarter of her shifts at Kelly's on a day other than Thursday, Friday and Saturday (Brief at p. 10). But there is no specific breakdown or analysis of the exhibit to support that assertion.

Indeed, the exhibit itself has questionable reliability. It does not cover the first half of Helms's employment at Kelly's; its entries begin on November 1, 2014, coinciding, for the most part, with the period during which Helms was protesting that newer employees were given the more lucrative shifts to her detriment—a protected activity for which she was unlawfully discharged by Respondent. Moreover, there are errors in the exhibit, as pointed out in the cross-examination of Mitchell. See Tr. 122-124. For example, there are entries for 4 consecutive days in early November 2014 showing that Helms worked 24 hours each day, a clear impossibility. And some entries appear to be duplicates. My own analysis of R. Exh. 2 shows that, even given the limited period covered by the exhibit, when Helms worked on shifts other than her regular shift, the hours were much fewer. In any event, nothing in the exhibit contradicts Helms's credible testimony that she worked these other shifts only when asked and when she could easily obtain child care assistance.

#### Discussion and Analysis

Respondent concedes that some backpay is owed Helms as a result of her discriminatory discharge. It does not take issue with the backpay calculations or the interim earnings set forth in the compliance specification. Nor does it take issue with the net backpay figures set forth above. It contends only that Helms incurred a willful loss of earnings at the beginning of her unemployment from the second quarter of 2015 through the first quarter of 2016, even though she had interim earnings in two of those 4 quarters and had substantial interim earnings during the rest of the backpay period. Tr. 7-10; G.C. Exh. 2.<sup>3</sup>

It is well settled that it is Respondent's burden to show that backpay should be reduced because of a discriminatee's willful loss of interim earnings. Although the discriminatee must make reasonable efforts to secure interim employment, it is Respondent's burden to demonstrate affirmatively that she failed to exercise reasonable diligence in searching for work. The Board has stated that "a respondent's contention that a discriminatee has failed to make a reasonable search for work generally has two elements—one, that there were substantially equivalent jobs within the relevant geographic area and, two, that the discriminatee unreasonably failed to apply for those jobs." *Teamsters Local 25*, 366 NLRB No. 99, slip op. 2 (2018). It is not sufficient simply to show that some jobs existed, but they must be substantially equivalent jobs, including pay, working conditions, commutes, work locations, hours, shift scheduling and benefits. *Id.* at slip op. 2-3.

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<sup>3</sup> In its brief (pp. 7-8), Respondent erroneously suggests that Helms should be faulted for not obtaining interim employment within two weeks of her unlawful discharge. That is not the law and the cases cited by Respondent make clear that the two week period refers to the required beginning of the search for interim employment. See *Domsey Trading Corp.*, 351 NLRB 824, 831-832 (2007). Helms clearly satisfied the latter requirement, as shown in the factual statement above.

Although the discriminatee must put forth an honest, good faith effort to find interim work, success is not required. Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent who unlawfully caused the discriminatee's loss of employment. Moreover, the sufficiency of the search for employment is measured by the backpay period as a whole, not by an isolated portion of the backpay period. *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006); and *Bauer Group*, 337 NLRB 395, 396 (2002). What constitutes a reasonable effort depends on all the circumstances. *Lucky Cab Company*, 366 NLRB No. 56, slip op. 4 (2018). See also *NLRB v. Jackson Hospital Corp.*, 557 F.3d 301, 307-308 (6<sup>th</sup> Cir. 2009), where the Court emphasized that the reasonableness of the effort to find interim employment must be evaluated "in light of the individual's background and experience and the relevant job market."

Applying the principles set forth above to the facts in this case, I find, based on the credited testimony of Helms, as well as the supporting documentary evidence she provided of her job search, that Helms made an honest and reasonable search for interim employment that was substantially equivalent to her prior employment with Respondent. This included the limitations in geographical area, days, hours, and other working conditions inherent in her prior job. It also included due accommodation for her child care needs, an accommodation that was part of her prior job. See *Essex Valley Nurses Assn.*, 352 NLRB 427, 438-439 (2008). Of course, she eventually found such a job, which cut off Respondent's back pay liability.

I also find that Respondent has failed to meet its burden to show that Helms did not make a reasonable search or otherwise incurred a willful loss of earnings. Respondent did not attempt to show the availability of even one substantially equivalent job that Helms failed to apply for or rejected. Nor did it show the details of any such job, including its hours, geographic area, wages or working conditions. Respondent did not, for example, specifically question Mitchell on this point or submit independent or documentary evidence on the matter. Its arguments, whether in connection with questions during the hearing or in its post-hearing brief, amount to little more than speculation and supposition.<sup>4</sup>

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<sup>4</sup> In questioning during the hearing and in its brief (p. 11), Respondent suggested that, because Sunday was the one day her husband was available to baby sit all day, Helms should have affirmatively asked potential employers whether she could work that day. It appears that Respondent expected Helms to give up her only day for family time—the Biblical day of rest—in order to cut its monetary liability. However, the extent of Helms's Sunday work at Kelly's is unclear on this record. But, if and when she did work on Sundays, it would have been only if she were asked and if she could obtain child care assistance. In any event, it was not required that Helms exhaust all possibilities in her search for employment. It is up to Respondent to show that Helms's overall search was unreasonable. But, even focusing on Sunday work, Respondent has not shown that Sunday work was available and offered to Helms and refused by her. Nor is there a showing that such work was offered and refused as part of other shifts that would have been comparable to her work at Kelly's.

Thus, Respondent failed utterly to meet its burden in this respect. Accordingly, I find that Helms is entitled to the full amount sought in the compliance specification.

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## ORDER

Respondent, Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom, its officers, agents, successors and assigns, shall:

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1. Make whole Robin Helms by pay her \$23,333.43, plus interest as prescribed in *New Horizons*, 283 NLRRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal and State law.

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2. Reimburse Robin Helms for the adverse tax consequences of the lump sum backpay award, as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

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Dated at Washington, D.C., December 20, 2018.

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Robert A. Giannasi  
Administrative Law Judge